## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

| ROCKVILLE GENERAL HOSPITAL, |             |                     |
|-----------------------------|-------------|---------------------|
|                             | Respondent, |                     |
| and                         |             | Case No. 34-RC-2314 |
| AFT CONNECTICUT,            |             |                     |
|                             | Petitioner. |                     |

## PETITIONER'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

The Petitioner, AFT Connecticut, submits this Answering Brief in Opposition to Respondent's Exceptions. For the reasons stated below, the Board should reject the Respondent's exceptions, uphold the Hearing Officer's Report and Recommendations on Objections, invalidate the election which was held on May 13, 2009, and order that a new election be conducted.

### I. Procedural Posture

This case comes before the Board due to the filing by Respondent of exceptions to NLRB Region 34 Hearing Officer Margaret A. Lareau's 51 page, comprehensive, thoroughly researched and explicated Report and Recommendations on Objections. The matter concerns an election that was held at Rockville General Hospital in Vernon, Connecticut on May 13, 2009 pursuant to the terms of a stipulated election agreement. The election resulted in 45 votes being cast in favor of Petitioner and 46 being cast for Respondent. On May 19, 2009, Petitioner filed six timely objections to the election. With the approval of the Regional Director, objections 2-6 were withdrawn. Objection 1, which concerned the surveillance or impression of surveillance of

workers wearing pro-union buttons, was the subject of a full two-day hearing held July 9-10, 2009 before Hearing Officer Lareau in Hartford, Connecticut.

At the July 9-10, 2009 hearing, a full and complete opportunity was provided to the parties to present evidence concerning the objection. Petitioner elicited testimony, subsequently deemed credible by the Hearing Officer, that Nurse Supervisor Judith Thompson was an agent of management. (Rep. 51). She made statements to Sharon Thompson, an eligible voter, that management was keeping a list of individuals wearing pro-union buttons. <u>Id.</u> Furthermore, five additional eligible voters had heard a report that management was listing those who were wearing buttons. <u>Id.</u>

Subsequent to the close of the July 9-10, 2009 hearing, the parties submitted post-hearing memoranda, which were received on July 22, 2009. The Hearing Officer's Report and Recommendations on Objections was issued on September 4, 2009. Respondent's exceptions were received by the Board on September 18, 2009.

## II. <u>Summary of Petitioner's Argument</u>

The Hearing Officer's Report and Recommendations on Objections should be upheld because it is based upon sound credibility determinations and an accurate statement and analysis of well-settled Board law. As such, Respondent's exceptions should be rejected and a new election should be ordered. Each of Respondent's five exceptions is addressed in the subsequent section of this brief.

In its lengthy Brief in Support of Its Exceptions, Respondent has endeavored to re-litigate the evidentiary findings and credibility determinations in the Hearing Officer's report.

Respondent has done so despite the fact that it has long been the Board's established policy not to

overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). To date, this policy has been followed in over 260 Board cases. See e.g., Goffstown Truck Center, Inc., 354 NLRB No. 49 (2009); Parsec, Inc., 353 NLRB No. 96 (2009); Foxwoods Resort Casino, 352 NLRB No. 92 (2008). In an apparent attempt to convince the Board that the "clear preponderance of the relevant evidence" demonstrates that the credibility determinations were incorrect, Respondent has, at times, rather harshly criticized the Hearing Officer, a career Board employee. Petitioner submits that this harsh criticism is unfounded and her credibility determinations should stand.

The legal and factual argument advanced by Petitioner and accepted by the Hearing

Officer is as follows. Nurse Supervisor Judith Thompson was acting as an agent of the

Respondent. She twice made a statement to voter Sharon Thompson that management had been
told to keep a list of individuals wearing pro-union buttons. Furthermore, Judith Thompson made
a similar statement to Sandy Lambert, a charge nurse and non-eligible employee. Five additional
eligible voters heard a report that management was keeping a list of those individuals wearing
pro-union buttons. In light of the fact that the election was so close, based upon Judith
Thompson's statements to Sharon Thompson and the evidence about the report circulating to at
least five other voters, Petitioner's objection should be sustained, the election should be
invalidated, and a new election should be ordered. As will be shown in the subsequent section of

<sup>&</sup>lt;sup>1</sup> <u>See e.g.</u>, "Rather, the Petitioner's version of events and the Hearing Officer's conclusions were based upon pure speculation, without a scintilla of direct evidence." (Resp. Br. 14); "In doing so, the Hearing Officer made factual findings without support in the record, ignored evidence and testimony, and misinterpreted and/or marginalized the evidence." (Resp, Br. 28); "It is evident that the Hearing Officer relied upon irrelevant evidence and unsupported inferences to reach this tenuous conclusion." (Resp. Br. 30); "Despite the overwhelming evidence to the contrary, the Hearing Officer desperately attempted to piece together arguments to support her position." (Resp. Br. 32).

this brief, despite the many varied legal arguments advanced by Respondent, none of the above stated facts and legal arguments have been refuted.

### III. <u>Discussion of Respondent's Exceptions</u>

1. Judy Thompson was an agent of the Employer.

The Hearing Officer's finding that Judith Thompson was Respondent's agent was based on a test for agency status that is a well-settled matter of Board law. Hearing Officer Lareau found that, "there is substantial evidence that Judy Thompson was an agent of the employer in the spring of 2009." (Report 41). In doing so, Lareau cited the same case relied upon by Respondent in its brief, Pan-Oston Co., 336 NLRB 305 (2001). The Board's test for determining agency status is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. Waterbed World, 286 NLRB at 426-427. As the Hearing Officer correctly noted, the Board considers the position and duties of the employee in addition to the context in which the behavior occurred. Jules V. Lane, 262 NLRB 118, 119 (1982).

The evidence cited by the Hearing Officer concerning Judith Thompson is compelling. Thompson was, "visibly in charge, gathering information on the floors and in the departments, and adjusting staffing in response to that information. (Report 42). Thompson's job description states that she was engaged in "effective management and coordination of direct and indirect care activities." <u>Id.</u> She allocated available resources. <u>Id.</u> She provided "clinical and administrative leadership and expertise." <u>Id.</u> She "represented the organization." <u>Id.</u> And, "in the absence of the administrator and/or designee, had the authority and responsibility for administrative decisions and appropriate notification of the Administrator-on-Call." <u>Id.</u> This last

piece of evidence is particularly compelling considering the fact that when she was on duty, Thompson was "not merely the highest ranking individual on site," but "she is the spokesman for the Hospital." (Report 43). Hearing Officer Lareau ultimately determined that Sharon Thompson and Sandy Lambert, witnesses for Petitioner, were credible when they testified that they understood Judith Thompson to be a manager. (Transcript 12, 30). Finally, she cited to testimony of Respondent's witness, Assistant VP of Patient Services Mary Powers, who stated that Judith Thompson was above the charge nurses in the chain of command. (Report 43, *citing* Transcript 184-85).

As Respondent makes abundantly clear in its brief, it does not credit the testimony of Sharon Thompson and Sandy Lambert about any topic, including their perception of Judith Thompson's status. The Hearing Officer, however, based upon her experience taking evidence and conducting the July 9-10, 2009 hearing did credit the testimony of Judith Thompson, Sharon Thompson, and Sandy Lambert concerning the status as agent of Judith Thompson (Report 21-22). Respondent has presented absolutely no compelling reason to disregard Hearing Officer Lareau's credibility determinations regarding this matter. It is significant that Respondent can do no more than present the Hospital's position that it "does not consider its nursing supervisors as members of management." (Resp. Br. 31). In the end, the relevant question is not whether Judith Thompson was *actually* a member of management, but rather whether she was an agent. The overwhelming balance of the credited testimony holds that Judith Thompson met the Board's test for agency status and this exception should, therefore, be rejected in its entirety.

2. Judy Thompson informed an employee, Sharon Thompson, that the Employer had instructed management to list employees wearing Union buttons.

This is an exception to a credibility finding of the Hearing Officer and should be dismissed as per Board policy. Stretch-Tex Co., 118 NLRB at 1361. Hearing Officer Lareau, after two days of hearings determined, based upon her observations of the demeanor of the witnesses and other relevant factors, that Judith Thompson "twice told Sharon Thompson that management had instructed its supervisors to keep a list of those wearing buttons." (Report 31). Furthermore, she discredited "Judy Thompson's blanket denial that she made these comments or spoke to Sharon about the buttons." Id. Lareau states unequivocally, "I do not believe that Sharon Thompson made up both these conversations." Id. The fact that Respondent does not credit Petitioner's witnesses is not surprising; it is also not determinative. Respondent provides no reason, compelling or otherwise, to disregard Hearing Officer Lareau's credibility determinations. As such, this exception should be rejected in its entirety.

3. The Petitioner established dissemination of any alleged improper statements.

This is an exception to a credibility finding of the Hearing Officer and should be dismissed as per Board policy. Stretch-Tex Co., 118 NLRB at 1361. It is also vague and nonspecific; a reader of this objection is at a loss to know which "alleged improper statements" were or were not disseminated and to whom they were not disseminated. Assuming Respondent is referring to the statements made by Judith Thompson that management was keeping a list of individuals wearing pro-union buttons, Petitioner has argued and the Hearing Officer has concluded that this statement was disseminated to a significant extent, such that it was "in the air" and known to have affected at least six eligible voters, far more than the number of voters who determined the margin of victory for Respondent in the May 13, 2009 election.

The Hearing Officer determined that statements, ultimately attributable to Judith
Thompson, were disseminated to eligible voter Peggy Clark. (Report 31). Hearing Officer Lareau
credited Meagan Mansfield's testimony that two additional eligible voters were made aware of
these statements. (Report. 34). In addition to the two employees and Clark, Mansfield, and
Sharon Thompson, there was an additional employee about whom Sharon Thompson testified,
Joanne Tolisano. (Report 35). Hearing Officer Lareau credited the testimony of Petitioner's
witnesses that statements attributable to Judith Thompson were known by all six of these
individuals. Respondent has presented no compelling reason to disregard the Hearing Officer's
credibility determinations regarding this matter. As such, this exception should be rejected in its
entirety.

4. The Employer created the impression of surveillance.

The Board law relied upon by the Hearing Officer in determining whether there was an impression of surveillance is well-settled and incontrovertible. An employer violates Section 8(a) (1) if it creates the impression amongst its employees that it is engaged in surveillance. Classic Sofa, Inc., 346 NLRB 219 (2006). Taking notes of open union activity or making lists of it has repeatedly been found to violate Section 8(a)(1). Crown Cork & Seal, 254 NLRB 1340 (1981). These cases and others cited by the Hearing Officer on page 46 of her Report are good law and substantiate the Hearing Officer's finding that the impression of employer monitoring of nurses wearing pro-union buttons that was in the air and held by at least six eligible voters was a violation of Section 8(a)(1).

Respondent goes to great lengths in its brief to re-litigate evidentiary matters concerning when certain individuals were in the hospital and who said what to whom. The gravamen of their

argument appears to hold that due to the fact management was, in their estimation, not actually surveilling the nurses wearing pro-union buttons, there is no way an impression of such surveillance could exist. This is a novel theory completely at odds with Board law. In determining whether an employer has created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance. Wal-Mart Stores, Inc., 352 NLRB No. 103 (2008).

Evidence was presented and the Hearing Officer concluded based upon a well-settled test that Judith Thompson was Respondent's agent. Section 2(2) of the Act states that the term "employer" includes, "any person acting as an agent of an employer, directly or indirectly." The Hearing Officer credited testimony that Nurse Supervisor and employer agent Judith Thompson told Sharon Thompson and Sandy Lambert that management was keeping a list of employees wearing pro-union buttons. This testimony was in the air and at least six nurses were under a credible impression that Respondent was keeping track of employees wearing pro-union buttons. This is the very essence of an impression of surveillance. Respondent's exception should be rejected in its entirety.

5. The Employer's conduct interfered with the conduct of the election and/or employee free choice.

The egregiousness of Respondent's violation of Section 8(a)(1) can be discerned by the context in which it occurred. During the two weeks immediately preceding a Board supervised election, Respondent created an impression of surveillance which, ultimately, resulted in an election result with a margin of victory for Respondent of one (1) vote. Credible evidence was received that between May 1, 2009, when the buttons were disseminated by the union, and May

13, 2009, when the election occurred, at least six eligible voters were under the impression that Respondent was keeping a list of employees wearing pro-union buttons.

The Hearing Officer employed a 9 point analysis from a recent Board case, Trump Marina, 353 NLRB No. 93 (2009). The results of that analysis demonstrate a significant impact on employee free choice. First, there were at least two incidents when Nurse Supervisor and employer agent Judith Thompson told employees that management was keeping a list of employees wearing pro-union buttons. Second, according to testimony deemed credible by the Hearing Officer, that of Sharon Thompson and Sandy Lambert, these incidents caused individuals to believe they were being surveilled. Compelling testimony by Margaret Clark at the July 9, 2009 hearing demonstrated without doubt that at least one employee was still in fear of Respondent many weeks after the violation of Section 8(a)(1) occurred. (Report 34). Third, the evidence establishes that at least six employees were under the impression of surveillance. It is important to keep in mind that this is an election in which Respondent prevailed by only one vote. Fourth, the violation of Section 8(a)(1) occurred during the two weeks immediately preceding the election. Fifth, all of Respondent's witnesses were able to testify about the impression of surveillance on July 9-10, 2009, many weeks after the misconduct occurred. Sixth, as noted above, at least six eligible voters were under the impression of surveillance. It is important to note that all of these employees were from the maternity and emergency departments of the hospital. Seventh, no misconduct by Petitioner has been alleged. Eighth, as noted, the impression of surveillance was created within two weeks of the final vote on May 13, 2009. Ninth, since the impression of surveillance was created by statements of an employer agent, Judith Thompson, the misconduct can be directly attributed to Respondent.

Pursuant to the test set forth in Trump Marina it is evident that Respondent's creation of

an impression of surveillance had a significant effect on employee free choice. As noted by the

Hearing Officer, it had a "strong chilling effect." (Report 47). In light of the one vote margin in

the election and the severity of Respondent's misconduct, it is reasonable to conclude that the

impression of surveillance affected employee free choice. Respondent's exceptions should be

rejected in their entirety and a new election ordered.

IV. Conclusion

For the reasons stated in detail above, Petitioner respectfully requests that the Board

reject, in all respects, Respondent's exceptions. The Board should invalidate the election held

May 13, 2009 and order that a new election be held.

Respectfully Submitted,

/s/ Samuel J. Lieberman

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FOR THE PETITIONER UNION

Dated: September 24, 2009

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petitioner's Answering Brief in Opposition to Respondent's Exceptions will be served today via electronic mail on the following:

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